80-169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

UNITED PARCEL SERVICE, INC.,

Petitioner,

- against -

WILLIAM MITCHELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTORY STATEMENT

The respondent is submitting this brief in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the grounds that there are no issues requiring determination by this Court and the petitioner's statement of the alleged issues to this Court is misleading.

OPINIONS BELOW

Neither the opinion of the United States District Court for the Eastern District of New York nor the opinion of the United States Court of Appeals for the Second Circuit, reversing the opinion of the district court, has been officially reported.

QUESTION PRESENTED

1. When an employee who is employed in the State of New York is discharged be-

cause an alleged arbitration has been held in Virginia regarding his discharge, at which he was not present and was unable to participate because of the Union's failure to adequately and fairly represent him, can the employee's claim against the Union under Section 301 of the Labor Management Relations Act of 1947 for a breach of its duty of fair representation be construed as a proceeding to vacate an arbitration award rather than an action against the Union for the breach of its duty of fair representation and an action against the employer for breach of contract?

STATUTES AND RULES INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (a), provides in pertinent part as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce... may be brought in any district court

of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 7511(a) of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §7511(a) (McKinney), provides as follows:

"When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

Section 213 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §213 (McKinney) provides in pertinent part as follows:

"The following actions must be commenced within six years: . . .

(2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code . . ."

Section 214 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §214 (McKinney) provides in pertinent part as follows:

"The following actions must be commenced within three years: . . .

(2) an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215 . . ."

STATEMENT OF THE CASE

The plaintiff was employed by the defendant United Parcel Service, Inc. at a Staten Island, New York facility, since 1964. He was a member of the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 ("Local 177"). Local 177 was a member union of the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International").

On January 13, 1977, plaintiff was advised by a UPS Division Manager that he was being discharged for dishonesty, allegedly stealing time by leaving the job early.

Plaintiff requested the Union to file a grievance on his behalf and was advised that a grievance would be filed and the Union would inform him when the hearing

was to take place. Plaintiff advised the Union that two employees were witnesses to what had occurred and would testify on his behalf.

Thereafter, plaintiff heard nothing from the Union when suddenly, on the afternoon of February 14, 1977, plaintiff was sent a telegram reading as follows:

> "Please be advised that your grievance against United Parcel Service concerning your discharge will be heard by the panel on Wednesday February 16 1977 in Virginia Beach Virginia if you wish to attend you must assume all your expenses please advise"

The plaintiff by this time had been out of work, had no funds to get to Virginia Beach, Virginia, could not possibly obtain witnesses on such short notice, could not obtain counsel, and was due at the Welfare Department on that day to obtain eating money for his family.

Up to the time that the plaintiff received the telegram advising him that the

grievance hearing would be held in Virginia Beach, Virginia, he had never expected or anticipated that the grievance hearing would be held anywhere other than the New York metropolitan area where such hearings had always been held in the past.

Thus, immediately upon receiving the telegram, the plaintiff contacted Local 177 and requested that the February 16, 1977 hearing date be adjourned or if it could not be adjourned, that the Local at the very least supply the plaintiff with funds so that he could attend the hearing in Virginia. Local 177 advised the plaintiff that there was nothing they could do for him and the plaintiff was unable to attend the hearing.

Thereafter, the plaintiff was advised by Local 177 that his discharge had been upheld by the grievance panel in Virginia and stated "that's the way it goes."

When the plaintiff reviewed the minutes of what had transpired in Virginia, it became clear to him that his interests had in fact not been represented by the Union at the grievance hearing. From the first time that the plaintiff was advised that charges were being brought against him for stealing time, he had denied those charges and said that they were false. He had consistently advised the Local of witnesses who could support the plaintiff's position.

At the hearing, the Union made a mockery of the plaintiff's position. The Union first presented to the Panel its position that Mr. Mitchell was in fact guilty, but was only doing what past practice had made seem permissible and that the plaintiff should have been warned to cease what he was doing and not been discharged. In any event, the Union went on to claim, the plaintiff should not have been fired. The Union then, in complete contradiction to the position it had just

presented, presented the plaintiff's own statement to the Committee which professed the plaintiff's innocence.

Most significant is the Union's failure to provide the plaintiff with adequate notice so that he could attend a hearing in Virginia and have his witnesses present. The extreme importance of this is that during the hearing, the panel members inquired of the Union Representative Purcell where the plaintiff was, and that Mr. Purcell responded that the plaintiff was not there. Obviously, if the plaintiff was not interested in appearing at the hearing, the panel could not help but feel that he was in fact guilty.

Based upon the foregoing facts and the Union's complete failure to fairly represent the plaintiff, the plaintiff commenced this action against Local 177 and the International based upon Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and a concurrent breach of contract claim

against UPS for their discharge of the plaintiff in violation of the collective bargaining agreement.

The plaintiff's action was commenced on July 20, 1978, approximately 17 months after his discharge was upheld by the grievance panel in Virginia Beach, in the United States District Court for the Eastern District of New York and was assigned to Judge Sifton. After some discovery was had, all of the defendants moved for summary judgment on the grounds that:

1. The action was allegedly barred by the applicable statute of limitations which the defendants claim was ninety days pursuant to CPLR 7511(a), the statute applicable to vacate an arbitration award;
2. The plaintiff allegedly had not set forth a proper claim for unfair representation in his complaint and thus his complaint against Local 177 and UPS must fall; and

3. The plaintiff had allegedly failed to exhaust his intra-union remedies.

Judge Sifton dismissed the plaintiff's complaint on the grounds that it was time-barred pursuant to CPLR 7511(a). Judge Sifton found that the action for a breach of its duty of representation was to be construed an attempt to set aside an arbitration award governed by New York's ninety-day statute of limitations to vacate an arbitration award pursuant to CPLR 7511(a). The Court below cited no authority in support of its decision except the case of Wallace v. AT&T, 460 F.Supp. 755(E.D.N.Y. 1978), another decision by the same Court reaching the same erroneous result.

The plaintiff appealed that decision to the United States Court of Appeals for the Second Circuit, which unanimously and properly found that the District Court's ruling that a ninety day statute of limitations to vacate an arbitration award was erroneously found to

apply in this case and that the proper statute of limitations was for breach of contract which, pursuant to New York CPLR 213(2), is six years.

In the Court of Appeals, plaintiff had argued that in the alternative, the statute of limitations should be three years for an action based upon a statutory right pursuant to CPLR 214(2).

The Court of Appeals properly found that it would be absurd to apply the statute of limitations to vacate an arbitration award to a Section 301 claim since the reason the §301 claim was brought was because there never was a proper arbitration. Under New York Law the plaintiff employee would not even have standing to challenge the arbitration award, see In re Soto, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d

282 (1960), and it would be unjust to require an employee who had been discharged from his position to retain counsel and file an action against his union within 90 days. The Court further pointed out that the Supreme Court in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966) had made it clear that a six-year statute of limitations would not affect the Federal Labor Policy which the defendants argued would be threatened if an employee was given a fair opportunity to bring an action against a union who had not properly represented him.

The Second Circuit reversed the granting of summary judgment by the Court below and reinstated the plaintiff's action.

It is from the above decision by the Court of Appeals that the petition for a writ of certiorari has been filed with this Court by the petitioner.

THE REASONS FOR NOT GRANTING THE WRIT

The decision by the Second Circuit is conceptually sound and arrives at a fair and just result.

Every Circuit Court which has considered the question of what statute of limitations to apply has reached the same result as that reached by the Second Circuit. See, Gray v. International Assoc. of Heat and Frost Insulators and Asbestos Workers, Local No. 51, 416 F.2d 313 (6th Cir. 1969); Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978); Price v. Southern Pacific Transportation Company, 586 F.2d 750 (9th Cir. 1978); and Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771 (4th Cir. 1978). District courts who properly con-

sidered the question had reached the same result, Canada v. United Parcel Service, Inc., 446 F.Supp. 1048 (N.D. Ill. 1978); and the only New York State case which peripherally considered the issue, Jackson v. Regional Transit Service, 54 A.D.2d 305, 388 N.Y.S. 2d 441 (4th Dept. 1976), reached the same result.

Simple logic likewise requires the same result, since an unfair representation claim can arise in situations where an arbitration proceeding is never held, for example, where the union refuses to take the case to arbitration in the first place. As the Supreme Court stated in Hines v. Anchor Motor Freight, Inc., 424 U.S. 544 (1976),

> "To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to

fairly represent the employee. In neither case, does the employee receive fair representation." 424 U.S. at 572 (emphasis supplied)

There is thus no valid legal issue that the proper statute of limitations is not one to set aside an arbitration award, and the few district court cases cited by the petitioner are aberrations which had become self-perpetuating until the various circuit courts had an opportunity to rule on the matter as they have now done.

The petitioner's contention that the local courts are in conflict and confusion is based on a misreading of the lower court cases and several erroneous decisions by the district courts which, for whatever reason, were never appealed. There is no conflict between the Courts of Appeals, and no Court of Appeals has held that the proper statute of limitations is one to set aside an arbitration award.

The spectre raised by the petitioner that a six year statute of limitations threatens the Federal Labor Policy is simply a creation of petitioner's counsel who would like to cut off employees' rights before they have a realistic opportunity to obtain counsel and commence an action. The policy with regard to labor proceedings is not affected at all since the only time a §301 claim ever arises is one where the arbitration process is already broken down. If there is a valid arbitration, there never can be a valid §301 claim.

The only time a valid §301 claim arises is when the employee never had fair representation during the grievance procedure -- either the union wrongfully refused to proceed to arbitration or the union failed to properly represent the employee during arbitration, and in

those cases where there is a proper arbitration there never is a valid §301 claim. Thus, the petitioner's argument about Federal Labor Policy being thwarted is entirely unfounded.

CONCLUSION

For the reasons set forth above, we respectfully urge that the petition for a writ of certiorari to the United States Court of Appeals be denied.

Dated: September 3, 1980

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